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No. 548

In the Supreme Court of the United States

OCTOBER TERM, 1958

ALBERT J. BARTA, JOHN E. BARTA, CHARLES K. FAILING, CLAIRE COOMES, A. R. DAVIES, JOHN GLOVER, MERTON GLOVER, JACK LEWIS, MARVIN SPRACKLIN, CYRUS PORCH and WILLIAM PORCH, PETITIONERS

v.

OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION OF SOUTH DAKOTA, and JAMES IRON CLOUD and UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. 19-28) is reported at 259 F.2d 553.

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1958 (Pet. 29-33). The peti-

tion for a writ of certiorari was filed on December 1, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the federal district court had jurisdiction over a suit by the United States to collect a tax imposed by an Indian tribe, organized under federal law, on the use of Indian Reservation lands by nonmembers of the tribe.

2. Whether a tribal tax imposed on nonmembers for the use of Indian Reservation lands violates the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT

The facts in the three cases here involved in which the United States is a party [1] are relatively undisputed and may be summarized as follows:

The suits were instituted on March 5, 1957, by the United States on behalf of the Oglala Sioux Indian Tribe of the Pine Ridge Reservation, South Dakota. They were brought for the recovery of certain taxes levied by the tribal council upon nonmembers of the Tribe leasing lands within the reservation for grazing purposes. Pursuant to Section

[1] These three proceedings were consolidated for purposes of trial with two cases brought by, and in the name of, the Tribe for collection of the tax against other defendants. The five cases were consolidated in the Court of Appeals which dismissed the appeals as to the two cases brought by the Tribe for failure to file a timely notice of appeal (see Pet. 20-22).

16 of the Wheeler-Howard Act of June 18, 1934, 48 Stat. 987, as amended, 25 U.S.C. 476, the Oglala Sioux Tribe adopted a constitution, subsequently approved by the Secretary of the Interior, which authorized the tribal council "to levy taxes or license fees, subject to review by the Secretary of the Interior, upon nonmembers doing business within the reservation." Under this authority, the tribal council passed Resolution 147-50 which provides that nonmembers of the Tribe leasing land on the reservation were to pay to the Treasurer of the United States, for credit to the account of the Tribe, an assessment of three cents per acre per annum for the use of such land for grazing purposes in addition to grazing fees.[2] The assessment was made to establish a special fund to be used for general public purposes of the Tribe such as police protection, fire control, road construction and maintenance, etc. The resolution was duly approved by the Superintendent of the Bureau of Indian Affairs at the Pine Ridge Indian Agency and submitted to the Secretary of the Interior, who permitted it to go into effect.

Petitioners are nonmembers of the Oglala Sioux Tribe who have leased lands within the reservation for grazing purposes. Pursuant to Resolution 147-50, petitioners were assessed at the designated rate. However, they have refused to pay the tribal tax levied since November 1, 1953. In these actions

[2] The reason for a separate assessment in addition to grazing fees is the fact that within the Reservation there are trust allotments on which the grazing fee or rental is paid to the allottee rather than the Tribe.

brought to collect the tax, verdicts were directed for the plaintiff and judgments were entered on September 27, 1957. On appeal, the judgments were affirmed, the Court of Appeals rejecting unanimously petitioners' attack upon the jurisdiction of the District Court to entertain suit by the United States as well as their attacks on the validity of the taxes.

ARGUMENT

1. The jurisdiction of the District Court over these cases instituted by the United States on behalf of the Tribe was based on 28 U.S.C. 1345, which provides, in part, that "the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States * * *". It has long been firmly established that the United States has the legal standing to protect by suit the rights of Indian tribes, especially in their reservation lands. *Heckman* v. *United States*, 224 U.S. 413; *United States* v. *Candelaria*, 271 U.S. 432; *Alonzo* v. *United States* 249 F.2d 189 (C.A. 10), certiorari denied, 355 U.S. 940. This authority of the United States to sue on behalf of Indian tribes is so well settled that it is ordinarily not challenged, *e.g.*, *United States* v. *U.S. Fidelity Co.*, 309 U.S. 506; United *States* v. *West*, 232 F.2d 694 (C.A. 9), certiorari denied, 352 U.S. 834; *Moore* v. *United States*, 157 F. 2d 760 (C.A. 9), certiorari denied, 330 U.S. 827; *Hanson* v. *United States*, 153 F.2d 162 (C.A. 10); *United States* v. *Drumb*, 152 F.2d 821 (C.A. 10); *American Surety Co. of New York* v. *United States*, 112 F.2d 903 (C.A. 10). The early case of *Crabtree*

v. *Madden*, 54 Fed. 426 (C.A. 8), relied on by petitioners for the proposition that the federal court lacked jurisdiction (Pet. 10-11), was plainly overruled by the contrary decisions of this Court and the court below (including the ruling in the instant case). See the cases cited above, and *Maxey* v. *Wright*, 54 S.W. 807 (C.A. Ind. T.), affirmed without opinion, 105 Fed. 1003 (C.A. 8); *Buster* v. *Wright*, 135 Fed. 947 (C.A. 8).[3]

2. Petitioners' second contention challenges the validity of the tax by questioning, first, the power of the Tribe to levy the tax, and, secondly, the constitutionality of the tax. Neither point has any merit.

(a). The power of the Oglala Sioux Tribe to levy the disputed tax was unequivocally affirmed in *Iron Crow* v. *Oglala Sioux Tribe of the Pine Ridge Res.*, 231 F.2d 89 (C.A. 8). The courts below, in this case, have likewise correctly upheld the validity of the tax on the basis of settled and accepted principles of law announced by this Court. By treaty, many of the Indian tribes have had authority to admit onto the reservation those whom they choose and to impose conditions of entrance. Such a treaty authorizes the Oglala Sioux Tribe to impose restrictions on the presence of nonmembers within the reservation. In *Buster* v. *Wright*, 135 Fed. 947, the Eighth Circuit held that from this authority

[3] The United States also has here an interest deriving from the provision of the Tribal resolution that the assessment is to be paid to the Treasurer of the United States (*supra*, p. 3).

arose the power to tax nonmembers for the privilege of conducting their business on the reservation; the treaty provision forms the basis for distinguishing, for purposes of taxation, between members and nonmembers. See also *Morris* v. *Hitchcock*, 194 U.S. 384, 389.

(b). Petitioners contend that the tax violates their constitutional rights under the Fifth and the Fourteenth Amendments against discrimination. But whether or not the due process clauses of the Fifth and Fourteenth Amendments (and the equal protection clause of the Fourteenth Amendment) apply to legislation of the Indian tribes,[4] it seems clear that making a distinction for tax purposes between members of the Tribe and nonmembers is a reasonable one in view of the Tribe's power "to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders" (*Morris* v. *Hitchcock*, 194 U.S. 384, 389).

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[4] As the court below indicated (Pet. 26-27), there is authority for the general position that neither amendment is applicable to tribal action for the reason that the tribes are creatures of neither a state nor the federal government (cf. *Talton* v. *Mayes*, 163 U.S. 376; *Worcester* v. *Georgia*, 6 Pet. 515; *Slaughter-House Cases*, 16 Wall. 36; *Elk* v. *Wilkins*, 112 U.S. 94; *Morris* v. *Hitchcock*, 194 U.S. 384), but it is not clear whether this general proposition is correct with respect to the due process and equal protection clauses, or whether it applies only to other, specific, provisions of the Constitution such as the right to indictment.

CONCLUSION

The ruling below is plainly correct. There is no conflict of decision nor question calling for review by this Court. It is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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